



May 18, 2001

Ms. Kristi LaRoe
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2001-2066

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 147392.

The Tarrant County District Attorney (the "D.A.") received requests for all files, records, and any other documents pertaining to a named individual who was convicted of murder and is currently on death row, and copies of the written policies and procedures for the handling of mail written or received by an inmate that were in effect in 1996. You indicate that the documents contained in the D.A.'s prosecution file that are also contained in a public court record have been released to the requestor. You seek to withhold the remaining responsive information. You have submitted for our review representative samples of information from the D.A.'s prosecution file (Exhibits E-1 through E-5), information from "Tarrant County Jail Files" (Exhibit E-6), and five pages of information responsive to the request for the mail handling procedures.¹ You assert that the information at issue is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. The requestor has also submitted comment to this office. See Gov't Code § 552.304. We have

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

considered the exceptions you claim, the submitted comments and arguments, and we have reviewed the submitted information.

You explain that the information contained in Exhibit E-5 is information held by the D.A. that was subpoenaed by a grand jury. You assert that this information is not subject to the Act. You also argue the applicability of section 552.101 of the Act² in conjunction with article 20.02 of the Code of Criminal Procedure. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that the Act does not require disclosure of records that are within the actual or constructive possession of a grand jury. *See* Open Records Decision No. 513 (1988). We understand you to assert that the information subpoenaed by the grand jury is in the constructive possession of the grand jury because the D.A. holds the information as an agent of the grand jury. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). This office has stated:

Information obtained pursuant to a grand jury subpoena issued in connection with [the grand jury's] investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by [a] district attorney is submitted to [a] grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney. Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of [the Act's] exceptions, but it is not excluded from the reach of [the Act] by the judiciary exclusion.

Open Records Decision No. 513 at 3 (1988). You represent that the information in Exhibit E-5 was obtained pursuant to grand jury subpoena. To the extent the information responsive to the request was subpoenaed by a grand jury and is thus held by the D.A. as an agent of the grand jury, such information is not subject to the Act and the Act thereby does not require its disclosure.³ However, the responsive information that was not obtained pursuant to a grand jury subpoena is subject to the Act. We understand Exhibits E-1 through E-4 and Exhibit E-6 contain such information. We also have no indication that the requested mail handling procedures were subpoenaed by a grand jury. Accordingly, we next address whether this information is excepted from disclosure.

²Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

³We therefore do not address the asserted exceptions for the information subpoenaed by a grand jury.

Exhibit E-1 contains certain documents that, evidently, the county has previously voluntarily released to the public. *See* Gov't Code § 552.007(b). These documents therefore may not be withheld from the requestor. We have marked the documents at issue with green flags.

Exhibits E-1 through E-4 comprise information from a completed investigation made of, for, or by the D.A. Section 552.022(a)(1) of the Government Code thus provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. You assert the litigation exception, section 552.103 of the Government Code, and the attorney work product privilege aspect of section 552.111. *See* Open Records Decision No. 647 (1996) (for pending litigation, the attorney work product privilege may be asserted under either section 552.103 or 552.111). Sections 552.103 and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022.⁴ However, because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we next address the section 552.108 assertion for the case file information represented by Exhibits E-1 through E-4.

Section 552.108 states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

⁴Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general); 473 (1987) (governmental body may waive section 552.111).

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You cite to section 552.108(b)(3), and in connection with your assertion of attorney work product, you argue that because the request essentially seeks the D.A.'s entire criminal case file, the information is excepted from disclosure in its entirety pursuant to the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because the decision of what to include in the file necessarily reveals the prosecutor's mental impressions or legal reasoning). In this instance, we agree that the request essentially encompasses a request for the prosecutor's entire case file. *Curry* thus provides that the release of the information would reveal the prosecutor's mental impressions or legal reasoning. Accordingly, except as otherwise noted herein, you may withhold the information in Exhibits E-1 through E-4 pursuant to section 552.108(a)(3)(B) and (b)(3)(B) of the Government Code.

We note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. See Open Records Decision No. 127 at 4 (1976). The D.A. must release to the requestor this information, whether or not the information is found on the front page of an offense report.

As noted above, Exhibit E-6 is information from "Tarrant County Jail Files." You have also submitted five pages of information responsive to the request for inmate mail handling procedures. Unlike Exhibits E-1 through E-4, we have no indication that this information

is subject to section 552.022(a)(1). Among other arguments, you assert that this information may be withheld pursuant to section 552.103. We note, however, that some of the documents in Exhibit E-6 contain information that, apparently, is also contained in a public court record. *See* Gov't Code § 552.022(a)(17). We have marked the documents at issue. To the extent this information is also contained in a public court record, it is not excepted from disclosure and must be released to the requestor. We have also marked in this exhibit six pages titled "Tarrant County Mobile Telephone Policy." We believe these documents, as well as the pages submitted as responsive to the request for inmate mail handling procedures, comprise policy statements or interpretations adopted or issued by an agency. *See* Gov't Code § 552.022(a)(13); *see also* *Id.* § 552.022(a)(10). As we have no indication that these documents are expressly confidential under other law, we conclude this information must be released pursuant to section 552.022, and have marked the documents accordingly. For the remaining information in Exhibit E-6, we next address the section 552.103 assertion.

Section 552.103 states:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. Section 552.103(a) was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation.⁵ Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery.

⁵The Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) ("the fundamental purposes of the Act and of civil discovery provisions differ"); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Act to discovery process).

Open Records Decision No. 551 at 3 (1990). The D.A. has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The D.A. must meet both prongs of this test for information to be excepted under 552.103(a).

You state:

[I]n this case, the Requestor is an attorney representing [the named individual] in a federal habeas lawsuit. . . . In July of 1997, [the named individual] was sentenced to death. . . . He has filed a federal habeas case seeking to challenge his conviction. . . . Until [the named individual] exhausts all postconviction remedies in state and federal court, the State of Texas remains a party to litigation with respect to [the named individual's] conviction and the documents related to that litigation are excepted from public disclosure by the plain language of 552.103.

Based on the above representations, as well as our review of the supporting documentation and of the information at issue, we find the D.A. has demonstrated both prongs of the above-stated test. Except as otherwise noted herein, the D.A. may therefore withhold the information in Exhibit E-6 pursuant to section 552.103. Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We have no indication that any of the information in Exhibit E-6 has been made available to the opposing party. We also advise, however, that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, Exhibit E-5 is not subject to the Act and the Act therefore does not require its disclosure. As to Exhibits E-1 through E-4, except for basic information that is not excepted from disclosure pursuant to section 552.108(c), and except for the documents we have marked in Exhibit E-1 that are subject to release under section 552.007(b), the D.A. may withhold Exhibits E-1 through E-4 pursuant to section 552.108(a)(3)(B) and (b)(3)(B). As to Exhibit E-6, we have marked documents that appear to be subject to section 552.022(a)(17). To the extent this information is also contained in a public court record, it must be released to the requestor. We have also marked documents in Exhibit E-6, as well as documents responsive to the request for inmate mail handling procedures, that

must be released pursuant to section 552.022(a)(13). Based on our understanding that the remaining information in Exhibit E-6 has not been made available to the opposing party in the pending litigation, the D.A. may withhold this information at this time pursuant to section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

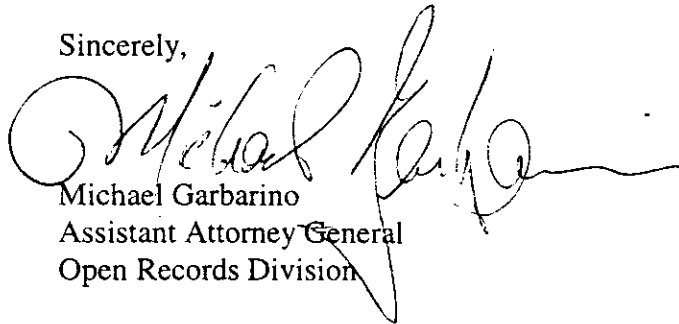
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 147392

Encl. Submitted documents

cc: Ms. Lydia Brandt
The Brandt Law Firm, P.C.
P.O. Box 850843
Richardson, Texas 75085-0843
(w/o enclosures)